



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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Audit Referral 99-09

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

THROUGH: JAMES A. PEHRKON
STAFF DIRECTOR

FROM: ROBERT J. COSTA
ASSISTANT STAFF DIRECTOR
AUDIT DIVISION

SUBJECT: REFERRALS FROM THE AUDIT OF DOLE/KEMP '96, INC. AND
DOLE/KEMP '96 COMPLIANCE COMMITTEE, INC.

Among the subject referrals are several that require some comment. The
Prohibited Contribution referral contains the extension of credit by
US Air.

Should you have any questions please contact Alex Boniewicz or Joe Stoltz

APPARENT PROHIBITED CONTRIBUTIONS

Section 441b(a) of Title 2 of the United States Code states, in part, that it is unlawful for any national bank, corporation or labor organization to make a contribution in connection with any election for Federal office.

Sections 116.3(a) and (b) of Title 11 of the Code of Federal Regulations state, in relevant part, that a corporation in its capacity as a commercial vendor may extend credit to a candidate or political committee provided that the credit is extended in the ordinary course of the corporation's business and the terms are substantially similar to extensions of credit to nonpolitical debtors that are of similar risk and size of obligation. An extension of credit in the ordinary course of the commercial vendor's business will not be considered a contribution.

Further, 11 CFR §116.3(c) states, that in determining whether credit was extended in the ordinary course of business, the Commission will consider:

- (1) Whether the commercial vendor followed its established procedures and its past practice in approving the extension of credit;
- (2) Whether the commercial vendor received prompt payment in full if it previously extended credit to the same candidate or political committee; and
- (3) Whether the extension of credit conformed to the usual and normal practice in the commercial vendor's trade or industry.

Finally, 11 CFR §116.3 (d), extension of credit by regulated industries, explains that the Commission may rely on the regulations prescribed by other Federal agencies to determine whether extensions of credit by the entities regulated by those Federal agencies were in the ordinary course of business.

Section 9003.2(a)(2) of Title 11 of the Code of Federal Regulations states, in relevant part, that to be eligible to receive payments under 11 CFR part 9005, each Presidential and Vice Presidential candidate of a major party shall, under penalty of perjury, certify to the Commission that no contributions have or will be accepted by the candidate and his or her authorized committee except for contributions solicited for and deposited to the candidate's legal and accounting compliance fund, or to make up any deficiency in payments received from the Fund.

Section 9007.2(b)(5) of the Code of Federal Regulations states, in part, that if the Commission determines that an eligible candidate of a major party committee, the candidate's authorized committee(s) or agent(s) accepted contributions to defray

qualified campaign expenses, it shall notify the candidate of the amount of contribution so accepted, and the candidate shall pay to the Treasury an amount equal to such amount.

1. Extension of Credit by US Airways

Office of the Secretary, Department of Transportation (DOT) regulations at sections 374a.4(a)(1) and (2) of Title 14 of the Code of Federal Regulations state, in relevant part, that unless full payment in advance is made, no air carrier shall provide transportation to any person it knows, or has reasons to know, is a candidate or a person acting on behalf of such candidate, in connection with the campaign of such candidate, except in accordance with, and subject to, the following conditions:

- (1) At least once a month the air carrier shall submit to each such candidate or person a statement covering all unsecured credit extended to such candidate or person, as the case may be (whether in connection with the campaign of such candidate or otherwise.); and,
- (2) Such statements shall be mailed no later than the second business day following the last day of the billing period, covered by the statement.

Section 374a.4(a)(4)(i) of Title 14 of the Federal Code of Regulations states that unsecured credit shall not be extended by an air carrier to a candidate, or to any person acting on his behalf in connection with the campaign of such candidate, so long as any overdue indebtedness of such candidate to such air carrier shall remain unpaid, in whole or in part, or so long as such air carrier shall know that any overdue indebtedness of such candidate to any other air carrier remains unpaid, in whole or in part.

Section 374a.4(a)(5)(ii) of Title 14 of the Federal Code of Regulations states that within 7 days after indebtedness becomes overdue for any unsecured credit extended by an air carrier to a person acting on behalf of a candidate in accordance with paragraph (a)(5)(i) of this section, the carrier shall notify the candidate in writing of the amount of the overdue indebtedness, and, unless paid in full within 25 days after the date of such notice, the overdue indebtedness shall be deemed to be the overdue indebtedness of the candidate, for the purposes of paragraph (a)(4)(i) of this section.

During the course of fieldwork, the Audit staff reviewed documentation associated with a debt owed by Dole/Kemp '96, Inc. to US Airways. The review indicated that DK received invoices from US Airways dated September 4, 1996 (\$76,905), September 18, 1996 (\$81,039) and October 2, 1996 (\$246,468), which were paid in full by September 18, 1996, September 26, 1996 and October 17, 1996 respectively. The next invoice, dated October 31, 1996, showed a balance due US Airways of \$561,439. The final invoice available for our review, dated December 4, 1996, indicated that DK had made no payments and the outstanding balance had increased to \$1,066,217. No additional billings for services were noted after December 4,

1996, however since the election had occurred approximately a month earlier DK likely had no further need for the travel account. DK made regular payments from December 12, 1996 through January 15, 1998 to reduce the amount due US Airways to \$325,409.¹ Since that time, additional payments have been made reducing the outstanding balance to \$272,037 at September 30, 1998².

As noted in the citations above, once a balance becomes an "overdue indebtedness" the carrier is required to follow specific procedures to obtain payment, or discontinue granting credit. Although discontinuing the granting of credit was not an option, given that the first unpaid bill did not become "overdue indebtedness" until after the election, there is no evidence in DK files that additional invoices were received from US Airways, or that other attempts were made by this vendor to collect the debt. Further, there was no evidence that this debt was secured in any manner by DK. The question of an extension of credit outside the ordinary course of business was discussed with DK representatives at a conference held at the conclusion of fieldwork.

Subsequent to this conference, DK representatives provided an unsigned statement which noted that US Airways did not give DK any favorable terms or payment schedules; and, that all dealings were "completely at arms-length." The statement also indicated that US Airways had made repeated demands for payment, but provided no evidence of such efforts. DK also provided a signed statement from Allen Haywood, DK Assistant Treasurer, which stated that a travel account was established with US Airways by the campaign's travel agent, McNair Travel, in order to consolidate all ticketing and billing; and, that US Airways representatives have been in "regular contact" with the campaign over collection of this debt. Additionally, although a May, 1997 collection letter from US Airways demanding payment is cited, no copy of such a document is provided. Finally, a letter from McNair Travel is provided which states that DK's relationship with US Airway's Air Travel Card Division "is typical of the arrangements with our other clients and is standard in the industry."

The Audit staff was not persuaded by DK's response. McNair travel is not in a position to address whether US Airways' extension of credit is in the normal course of its business or whether it complies with Title 14 of the Code of Federal Regulations. Information from US Airways about its billing and collection policies for similar clients has not been provided. Further, no documentation has been

¹ On it's 1997 Year End Report, DK disclosed a debt to US Airways in the amount of \$127,205. The Audit staff determined the correct amount to be \$340,781. Statements received from the U.S. Department of Transportation, that reflect US Airways' calculation of the amount owed, materially agree with the Audit staff's calculation. DK's response to the memorandum explains that the difference relates to amounts that were to be paid by the RNC as coordinated expenditures [2 U.S.C. §441a(d)]. Since the RNC has not paid the obligations, they are once again being recognized by DK.

² US Airways reported the following balances to the U.S. Department of Transportation on the dates indicated: September 30, October 31, and November 30, 1998, \$269,504; December 31, 1998, \$277,670; and, January 31, 1999, \$280,447.

provided of any efforts made by US Airways, after December 4, 1996, to collect this debt. In the Exit Conference Memorandum (Memorandum), the Audit staff concluded that DK received a contribution from US Airways. The amount of the contribution was \$1,066,217 at December 4, 1996 and that \$325,409 remained outstanding as of 2/28/98.

In the Memorandum, the Audit staff recommended that DK provide documentation to demonstrate that the credit extended by US Airways was in the ordinary course of business and did not represent a prohibited contribution. The information provided was to include examples of other customers or clients of similar size and risk for which similar services have been provided and similar credit was extended. Also, information concerning billing policies for similar clients, advance payment policies and debt collection policies were to be included.

In response to the Memorandum, DK restates its argument that it was not given favorable terms or payment schedules by US Airways. DK's response further states that Pam Garrett of US Airways calls Allen Haywood every 3-4 weeks for an update on the account. Finally, DK provides a generic letter dated December 4, 1996 from Mr. Frank Nicholson, Manager, Commercial Credit for US Airways, directed "To Our Valued Customers", which requests payment and notes that effective, January 1, 1997, late charges will start being assessed on outstanding balances. The letter provided was most likely directed to McNair Travel, the campaign's travel agent. No invoices were available after December 4, 1996, so it is not certain whether US Airways has actually assessed these late charges. However, DK's reported outstanding balance does not reflect any increase that could be attributed to late charges. The increases in the outstanding balances reported to the U.S. Department of Transportation beginning in December of 1998, may indicate the assessment of an interest charge.

The Audit staff concludes that DK has failed to provide documentation which demonstrates that US Airways did not extend credit outside of its normal course of business, as defined under 11 CFR §116.3. DK failed to provide documentation from US Airways detailing examples of other customers or clients of similar size and risk for which similar services have been provided and similar credit extended. Further, no information concerning US Airways billing policies for similar clients, advance payment policies or debt collection policies, or documentation of any efforts made by US Airways to collect this debt have been provided. Although not specifically requested in the Memorandum, no evidence has been provided to indicate that US Airways was in compliance with 14 CFR §374a.4.

During the Commission's consideration of this finding a motion was made to reject the Staff conclusion. That motion failed to receive sufficient votes to be approved. Subsequently, the Commission voted to receive this finding without any determination on the merits of the analysis of the facts or the interpretation of the law contained herein.